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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

—against—

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Motion for Leave to File Brief *As Amicus Curiae*

The Authors League of America respectfully petitions the Court for leave to file the annexed brief *amicus curiae*. The League is a national society of professional authors and dramatists. One of its principal purposes is to express the views of its members in cases involving the rights of free speech and press, and the freedoms to read books and view plays and films. The Court's decisions in *Miller* v. *California* and this case significantly affect those rights and freedoms, and the creative activities of many League members.

The Authors League believes that rehearing should be granted to clarify certain aspects of the opinion which

have been, and will be, grossly misunderstood by legislators, judges and prosecutors. While petitions for rehearing may not be the usual method of resolving such problems of interpretation, the widespread consequences of landmark opinions which create new First Amendment guidelines are not usual either. The new standard of *Miller* v. *California* will shape state legislation, the policies of prosecutors and the decisions of courts. There are misunderstandings of the guidelines which will produce unconstitutional statutes and prosecutions. We urge that the Court clarify its decision now to forestall them. For if it waits until unconstitutional convictions reach it many months from now, booksellers, librarians and theatre owners will needlessly suffer pressures, prosecutions, heavy legal expenses and even jail terms and fines; and many adults will be deprived of their rights to read and see works that are entitled to First Amendment protection under the *Miller* guidelines.

Therefore, The Authors League respectfully seeks the Court's permission to file the annexed brief *amicus curiae*. The Authors League has been advised by Stanley Fleishman, Esq., attorney for Petitioner, that he consents to the filing of this brief. Burt Pines, Esq., attorney for Respondent has not indicated, in response to the League's request, whether he would consent to its filing.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

—against—

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief of The Authors League of America as *Amicus Curiae*

INTEREST OF THE AUTHORS LEAGUE

The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in cases involving the rights of free speech and press, and the freedoms to read books and view plays and films. The Court's decisions in *Miller* v. *California* and in this proceeding significantly affect those rights and freedoms, and the creative activities of innumerable authors.

SUMMARY OF ARGUMENT

I. Rehearing should be granted to eliminate misunderstandings by courts and legislators concerning the appropriate community standard to be applied, the effect of the standard, and the function and application of the "serious value" test—under *Miller* v. *California*.

II. Courts and legislators have erroneously assumed that "local"—rather than state-wide—community standards may now be applied; and have misinterpreted *Miller* as permitting states or local communities to establish such standards by legislation.

III. A jury or judges cannot determine that a work lacks serious literary, artistic, scientific or political value by applying contemporary "community standards" or their own subjective judgment.

IV. Under the First Amendment, a bookseller, librarian or theatre owner cannot be criminally prosecuted for distributing a book or film if it has not previously been adjudged obscene in a prior civil, adversary proceeding.

V. The First Amendment prohibits any restraint on the distribution of books and films to adults who wish to read or view them, when the distribution is made by means that do not thrust the material on unwilling adults.

POINT I

Misinterpretations of the *Miller* Guidelines Should be Corrected Now, by Clarification of the Opinion on Rehearing, to Forestall Suppression of First Amendment Rights.

There has already been considerable misinterpretation of the revised constitutional standard, established in *Miller* v. *California*, 41 LW 4933 to regulate state obscenity statutes and prosecutions. There is bound to be more. For example, the Supreme Court of Georgia has erroneously interpreted *Miller* as permitting the application of "local" community standards — rather than a state-wide community standard —in judging the alleged prurient interest and patent offensiveness of the widely acclaimed film, "Carnal Knowledge". (Jenkins v. The State, July 2, 1973). Congressman Thaddeus Dulski* informed the House of Representatives, on June 29th, that "the Court now says that the offensiveness of material — whether it is obscene — can judged on the basis of local community standards." (Cong. Record, June 30, 1973; p. E4537). Other legislators have similarly misconstrued the "community standard" aspect of the guidelines.** There is also widespread confusion as to the nature of the "community standard".

Furthermore, there is a serious threat — as evidenced by the *Carnal Knowledge* decision — that legislators, prosecutors and judges have not understood (i) that the literary, artistic, political or scientific value of a book is not to be determined by "community standards"; and (ii) that a book or film which has "serious" literary or artistic value

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* Mr. Dulski is chariman of the Committee on Post Office and civil service, which considers much anti-obscenity legislation.

** Representative Sikes (Cong. Record, July 11, 1973; R. H5993); Representative Edwards (Cong. Record, June 28, 1973, p. H5639).

is (under the guidelines) still protected by the First Amendment against suppression, even though it be patently offensive or pruriently appealing.

These misinterpretations of the guidelines will produce statutes, prosecutions and convictions that violate the First Amendment as construed by *Miller*. Booksellers, librarians and theatre owners who are threatened, prosecuted or convicted because of these erroneous interpretations will suffer substantial and unredressable injury—if the Court waits long months or years until the consequences of the misinterpretations are presented to it by appeals from unconstitutional convictions. This needless suffering can be avoided if the Court grants rehearing and clarifies its opinion in the respects indicated below. Since the *Miller* guidelines were intended to mark the limits of obscenity laws and trials, it is essential that their application be clearly understood, now.

POINT II

The Misinterpretations of "Community Standards".

Under the *Miller* opinion, "contemporary community standards" are to be applied in determining the first two tests of the revised standard: i.e. whether the work taken as a whole appeals to prurient interest; and whether it is patently offensive in its description or depiction of specified sexual conduct. Two serious misinterpretations have been widely expressed, and applied. *First*, that the jury or court may apply the "standard" of the local community — town, village, city, county or even neighborhood — in which the book was distributed. *Second* that a state (or local community) can "establish" — i.e. legislate — "community standards".

"Local" Community Standards Cannot be Applied

The Supreme Court of Georgia (and various legislators) have already interpreted *Miller* to mean that "local" community standards, rather than a state-wide community standard, can be applied in determining prurient appeal and patent offensiveness. In the *Jenkins* ("Carnal Knowledge") opinion the Georgia Supreme Court said "The Miller case, supra, further held that juries can consider State *or local* community standards in lieu of 'national standards' ..." (emphasis supplied).

We believe that in *Miller*, this Court sanctioned the use of state-wide community standards, but did not hold that "local community standards" could be applied. It is essential that this be made clear, as soon as possible. The Authors League has expressed its view that even 50 state-wide standards will restrict dissemination of books and films that can only be produced if they may be distributed to national audiences. (Cong. Record, March 21, 1973; p. E 1719). But the application of innumerable "local community" standards would produce a massive crazy-quilt of censorship that would suppress—on a vast scale—the distribution of books and films of substantial literary and artistic value, which deal with sexual themes.

There are thousands of "local communities" in the United States—cities, towns, villages, counties and other political entities. If a work's prurient appeal or patent offensiveness can be judged differently under the separate standard of each community in which it is distributed, publishers and producers will steer away from non-obscene books and films likely to arouse any opposition because of sexual themes. They cannot afford to defend a multiplicity of suits.* And

* If local community standards are permitted, an appellate decision clearing a book or film of pruriency or offensiveness under one community's standard would still leave it exposed to many more suits in the state for the same offense, since other communities' standards could be different.

they cannot risk losing several markets, for their books and films must be distributed nationally to be economically viable. (Although a national or state-wide standard might sometimes be lower than that of a few liberal communities, it is far less inhibiting on publication and film production than the crazy-quilt censorship of "local" community standards.)

It is significant that *Miller* v. *California* was decided in the California courts on the basis of a state-wide community standard. Previously, the California Supreme Court had rejected the contention that local community standards should be applied in determining obscenity. *In Re Giannini*, 69 Cal. 2d 563, 72 Cal. Rep. 655, 446 P. 2d 535 (1968); cert. den. 395 U.S. 910 (1969). Refusing to apply "local" community standards, the California Supreme Court said:

> "... on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of the smaller community: whether it should be city, county, individual neighborhood within a city, or whatever. Morover, a strong policy favors uniformity of application of state criminal law (citation omitted); we promote this policy by assuring that the application of the obscenity law in this state will be based on a uniform 'community'." (446 P. 2d, at 547)

We believe that this Court, in *Miller* v. *California*, did not permit the application of "local" community standards. And we urge that it grant rehearing to make that point clear. Otherwise, many prosecutions will be threatened, commenced and sustained on the erroneous theory adopted by the Supreme Court of Georgia—claiming many booksellers, theatre owners and librarians as innocent (and needless) victims.

Community "Standards" Cannot Be Legislated

A widespread misunderstanding has developed that under *Miller* v. *California* states or local communities can "establish"—i.e. legislate—their own "standards" for determining obscenity. For example, Representative Edwards of Alabama told the House of Representatives on June 28, 1973 that in light of the Supreme Court's ruling

> "that the people of a *city* like Mobile, Ala. (do not) have to accept public depiction of conduct found tolerable in *cities* such as Las Vegas or New York. . . . I have introduced legislation to control the mailing or selling of indecent literature and to *let the local community determine its own standards.*" (Emphasis supplied) (Cong. Record, June 28, 1973; p. H5689).

Under *Miller*, as under *Roth* v. *United States* (354 U.S. 476), the "community standard" is applied in deciding whether a work appeals to prurient interest, and whether it is patently offensive. The community "standard" is a consensus, which may shift from time to time, and has to be ascertained by the jury as a matter of fact. These "standards" cannot be established, as a set of rules, by state or local legislation. And states, towns, cities and counties cannot set up their own "standards" to define what is "obscene" and, therefore, may be prohibited despite the First Amendment. The standards which determine the definition of obscenity are the 3-part "guidelines" set forth in *Miller*. In view of the pervasive misconception that local communities or states can legislate other definitions of "obscenity", the Court should—on rehearing—leave no doubt that state legislatures are governed by the 3-part standard laid down in *Miller*, as they were bound by the earlier *Roth*

guidelines. This would make it clear to legislators and judges that a state cannot classify a work as "obscene" unless: taken as a whole, it appeals to prurient interest; *and*, its description or depiction of specifically defined sexual conduct* is patently offensive; *and* the work, taken as a whole, *also* lacks serious literary, artistic, political or scientific value.

POINT III

Misinterpretations of the "Serious Value" Test.

Under the *Miller* guidelines, the states (or local communities) cannot suppress a book or film that has serious literary, artistic, political or scientific value—even though it appeals to prurient interest and is patently offensive. Many critics and proponents have failed to grasp this limitation on the states' power to censor works dealing with sexual themes. Moreover, many of them have failed to recognize that a *lack* of literary, artistic, scientific or political value is not to be determined by applying a "community standard"; and is not to be determined by the subjective "literary" or "artistic" judgments of the jurors, trial judges or appellate justices.

Jurors and judges who might not personally consider that *Ulysses* had serious literary or artistic value, if they read it, would nonetheless concede that it had recognized "literary"

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* Much confusion stems from the fact that the Court's "examples" of patently offensive depictions of conduct, which the states may "define" under the second test, are not merely "examples" but a full cataloging of the types of offensive descriptions that could logically fit into this test. Many commentators and legislators have erroneously read "a few plain examples" as an invitation to the states to add more innocuous forms of amorous conduct to the list.

value—in the eyes of critics, scholars and other literary experts. Under the literary and artistic value test of *Miller*, a conviction of *Ulysses* or *Tropic of Cancer* or *Lady Chatterly's Lover*, would be reversed by this Court. However the First Amendment protects new works as well as battle-scarred veterans of the censorship wars. And the recent decision of the Supreme Court of Georgia, in the CARNAL KNOWLEDGE case, indicates the need for clarification of the "serious value" standard.

As the minority opinion of Justice Gunter indicates, the film was received by prominent reviewers as a work with serious literary and artistic value, as indeed it is. As Justice Gunter's opinion also indicates, the four members of the majority substituted their personal evaluation of the film's literary and artistic merits (an evaluation with which the three members of the minority strongly disagreed). On rehearing, the Court should make it clear that a jury or judge cannot decide that a work lacks serious literary or artistic value by applying "community standards" or their own subjective judgment. The Court has pointedly limited the application of community standards to the prurient interest and patent offensiveness tests. Clearly it did not intend that community standards be used in judging literary, artistic, scientific, or social value. The Springfield REPUBLICAN may have reflected the standards of the community when it pronounced in 1934 "That the book (ULYSSES) possesses literary importance, except as a tour de force, is hard to believe." (Book Review Digest, H. W. Wilson Company, 1934). But ULYSSES had serious literary and artistic value, nonetheless, in Paris, New York—and Springfield.

Lack of scientific and literary value cannot be established by majority vote, which is essentially what the "consensus" of community standards reflect. Moreover, majorities (per

se) are not qualified to pass judgment on the literary or artistic value of books. Example: in a 1969 Gallup poll, 58% of the adults polled said "they had never read a book from cover to cover. . ." (PUBLISHERS WEEKLY, June 2, 1969, p. 59) Example: "According to figures familiar to librarians, 20 per cent of book users account for 70% of book use. According to a PUBLISHERS WEEKLY survey of several years ago, 9 per cent of the population buys 70% of all paperbacks." (*The Future of General Adult Books and Reading in America*, American Library Association; 1970; p. 92)

Under the Miller guidelines a prurient, patently offensive work can only be suppressed if it lacks "*serious*" literary, artistic, scientific or political value. It seems clear that the word "serious" was intended to require some discernable quantum of literary or artistic value—to prevent unadulterated, hard-core pornography from being "redeemed" by inserting "a quotation from Voltaire on the flyleaf." In view of the widespread misunderstanding of the revised guidelines, the Court should (on rehearing) make it clear that "serious" is a measurement of quantum and not a requirement that the work be sober rather than comic, or didactic rather than entertaining. *Gargantua and Pantagruel* is "a comic and satirical masterpiece" (Encyclopedia Britannica, 1971; Vol. 18, p. 979); as such it has "serious" literary and artistic value under the *Miller* guidelines.

POINT IV

Rehearing Should be Granted to Reconsider The Requirement of a Prior Civil Determination of Obscenity.

In *Jenkins* v. *The State of Georgia*, a theatre owner was convicted and sentenced for making the same error of judgment committed by three justices of the State's highest court. He thought that the film was not "obscene" and exhibited it. But his failure to predict correctly how the jury would evaluate it subjects him to serious penalties. Most booksellers, theatre owners and librarians cannot safely predict whether controversial books or films will be adjudicated obscene—after they have exhibited or distributed them. And they cannot assume the heavy financial burdens and personal risks of a prosecution, even if it is unsuccessful or overturned on appeal. Consequently librarians, booksellers and theatre owners are driven to self censorship—they will not stock or show non-obscene films that are controversial. And they are easy victims of grass-roots censorship; threats of prosecution coerce them into removing or rejecting non-obscene works that are entitled to First Amendment protection under the *Miller* standards. The dynamics of that suppression are discussed in the brief *amicus curiae* of the Authors League (filed on July 18, 1978), urging the Court to note probable jurisdiction in *Kirkpatrick & Dargis* v. *People of the State of New York* (32 N.Y. 2d 17).

The Authors League believes that a judicial safeguard is needed to prevent widespread suppression of non-obscene books and films—and to provide fair notice to theatre owners like Mr. Jenkins, so they will not be jailed, fined, and subjected to calumny and heavy legal expenses, for conclud-

ing, as three Georgia Supreme Court justices did, that "Carnal Knowledge" was not an obscene film. That safeguard, which the League had proposed in earlier *amicus* briefs, was urged by Justice Douglas and approved by Chief Justice Burger in *Miller* v. *California*. On rehearing, the Court should rule that under the First Amendment, a bookseller, librarian or theatre owner cannot be criminally prosecuted for distributing or exhibiting a book or film which has not previously been adjudged obscene in a prior civil, adversary proceeding. The Authors League also urged this safeguard in its *Kirkpatrick* brief.

POINT V

On Rehearing, The Court Should Adopt the Conclusions Reached by Justice Brennan in *Paris Adult Theatre I*.

In its *amicus curiae* briefs in *Roth* v. *United States*, 354 U.S. 476 (1957) and *Ginzburg* v. *United States*, 383 U.S. 463 (1966), the Authors League urged this Court to take the position which Justices Brennan, Stewart and Marshall adopted on June 21, 1973 in *Paris Adult Theatre I* v. *Slaton*. (41 LW at 4955) In its *Ginzburg* brief the League said:

> ". . . no public interest, superior to the preservation of the rights of free speech and free press, is served by permitting (an obscenity) statute to be invoked where a book or other publication—regardless of content—is sold to adults and where it is published and disseminated in a manner that does not invade the privacy of individual citizens. . . .
>
> . . . neither Federal or State governments should interfere with the right of the author to write, the publisher to publish, or the reader to read. In these

circumstances, the absolute guaranty of the First Amendment can and should be retained. Not only are the rights of freedom of speech and press thus surely preserved, but each citizen is then free to make his own choice of reading material—which in a mature and free society is where the choice should rest."

That is still the position of the Authors League. We believe, for the reasons set forth in Mr. Justice Brennan's *Slaton* opinion, that it is the only solution compatible with the First Amendment. The Amendment is violated when a state prevents a librarian or bookseller from distributing to an adult TROPIC OF CANCER, LADY CHATTERLY'S LOVER, MEMOIRS OF HECATE COUNTRY, FANNY HILL or any other book he or she chooses to read. The Amendment is violated when a state prevents a theatre from exhibiting CARNAL KNOWLEDGE or CLOCKWORK ORANGE or any other film to adults who choose to see it. And it is a self-contradiction to rule that the First Amendment only protects works that are acceptable under "contemporary community"—i.e. majority—standards. The very purpose of the Amendment is to protect the rights of minorities to publish or read works that are unacceptable to the majority.

Furthermore, the TROPIC OF CANCER prosecutions and similar experiences prove that works of "serious" literary and artistic value cannot be adequately safeguarded unless there is complete protection for all works distributed to willing adults, by means that do not thrust them on unwilling recipients. CARNAL KNOWLEDGE is a film of serious artistic and literary value. Under the *Miller* v. *California* standard, therefore, it should not have been suppressed. But as Justice Gunter said in his dissenting opinion, his experience with the CARNAL KNOWLEDGE case "teaches me

that the Miller majority's assumption, that courts can distinguish commerce in ideas that is protected from commercial exploitation of material that is not protected, is a too optimistic assumption."

CONCLUSION

It is respectfully submitted that the Petition for Rehearing should be granted.

Respectfully submitted,

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